Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JAMES I. MUIRHEAD, LUCILLE MUIRHEAD, ROBERT E. MUIRHEAD, GLENDA MUIRHEAD, and JAMES I. MUIRHEAD and ROBERT E. MUIRHEAD D/B/A TIMBERLANE RANCH,

Petitioners,

v.

UNITED STATES OF AMERICA, ACTING ON BEHALF OF THE FARMERS HOME ADMINISTRATION, SEA LANDS, LTD. and CALVIN T. KIRKSEY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a deed of trust taken by the Farmers Home Administration in Mississippi survives forever or is extinguished by substantive, non-discriminatory Mississippi law providing that the lien of a deed of trust cannot exist without an enforceable underlying debt.

PARTIES TO THE PROCEEDING

1. James I. Muirhead; Lucille Muirhead; Robert E. Muirhead; Glenda Muirhead; James I. Muirhead and Robert E. Muirhead d/b/a Timberlane Ranch, a Mississippi Geenral Partnership, Defendants/Counterplaintiffs in the trial court, Appellants in the Court of Appeals for the Fifth Circuit and Petitioners here.

2. United States of America Acting on Behalf of The Farmers Home Administration, Plaintiff and Counter-defendant in the United States District Court for Southern District of Mississippi, Appellee in the Court of Appeals for the Fifth Circuit and Respondent here.

3. Sea Lands, Ltd., Third-Party Defendant in the United States District Court for Southern District of Mississippi, Appellee in the Court of Appeals for the Fifth Circuit and a Respondent herein.*

4. Calvin T. Kirksey, Jr., in his capacity as trustee of the deeds of trust in question, Counter-defendant in the United States District Court for Southern District of Mississippi, Appellee in the Court of Appeals for the Fifth Circuit and Respondent here.

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* There is no parent or subsidiary company or companies to Sea Lands, Ltd.

Sea Lands, Ltd. was the purchaser of one of the tracts of land covered in the Farmers Home Administration deeds of trust at the foreclosure sale conducted by Calvin T. Kirksey, an employee of the Farmers Home Administration who served as trustee in the deeds of trust in question.

The Department of Treasury—Internal Revenue Service, Deposit Guaranty National Bank and Staff Leasing of Mississippi, Inc. were parties to the proceeding in the trial court but did not appear or participate in the proceedings before the Court of Appeals for the Fifth Circuit.

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The Petitioners, James I. Muirhead, Lucille Muirhead, Robert E. Muirhead, Glenda Muirhead, and James I. Muirhead and Robert E. Muirhead d/b/a Timberlane Ranch, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 25, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 42 F.3d 964, appears in the Appendix hereto. The unreported decision of the United States District Court for the

Southern District of Mississippi also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 24, 1995. No petition for rehearing or for rehearing *en banc* was filed with the Court of Appeals. This petition for certiorari was filed within ninety (90) days of the date of the entry of the judgment of the Court of Appeals. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Mississippi Code Annotated:

§ 15-1-21. *Actions on mortgages, deeds of trusts, and statutory liens to be brought within time allowed for action upon writing in which debt is specified.*

When a mortgage or deed of trust shall be given on real or personal estate, or when a lien shall be given by law, to secure the payment of a sum of money specified in any writing, an action or suit or other proceedings shall not be brought or had upon such lien, mortgage, or deed of trust to recover the sum of money so secured except within the time that may be allowed for the commencement of an action at law upon the writing in which the sum of money secured by such lien, mortgage, or deed of trust may be specified. In all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred.

United States Code, Title 28:

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof

> which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: [1]

STATEMENT OF THE CASE

In 1979 and 1980, James I. Muirhead and his wife, Lucille Muirhead, Robert E. Muirhead and his wife, Glenda Muirhead, and James I. Muirhead and Robert E. Muirhead d/b/a Timberlane Ranch, a Mississippi General Partnership, (collectively hereinafter the "Muirheads"), negotiated loans with and executed promissory notes in favor of the Farmers Home Administration (hereinafter "FmHA"). These notes were secured by several deeds of trust on properties located in Copiah, Rankin, Hinds and Simpson counties in Mississippi. The Muirheads are all resident citizens of the State of Mississippi.

In April, 1982, FmHA sent the Muirheads notices of acceleration declaring all of the promissory notes immediately due and payable. A second notice of acceleration and demand for payment was sent to the Muirheads in May, 1985. Thereafter, FmHA did nothing more until October, 1991, approximately nine and one-half (9½) years after the original acceleration of the promissory notes, when it began preparing to initiate foreclosure proceedings with respect to the real property covered by the Muirhead deeds of trust.[2]

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[1] The lengthy remainder of this section is omitted for lack of relevance to this case.

[2] It should be noted that prior to January 10, 1991, 7 C.F.R. Part 1927(b) of the FmHA's regulations provided in pertinent part, that there was a six (6) year limitation on suits to foreclose security interests of the FmHA. On January 10, 1991 the FmHA removed this provision from its regulations.

In October, 1991 FmHA brought this action to reform one of the deeds of trust in the United States District Court for the Southern District of Mississippi. Also, in October, 1991, the FmHA commenced public notice, as required by Mississippi statute, to conduct power of sale foreclosures on its deeds of trust. In response to the reformation suit the Muirheads answered and counterclaimed that under Mississippi law, none of the liens was enforceable because the statute of limitations had run on each of the underlying notes. While the action was pending the FmHA completed its power of sale foreclosures on all of the properties except that covered by the reformation action. FmHA purchased all but one of the properties sold, the other tract being purchased by Sea Lands, Ltd., a Mississippi corporation. As a result, the Muirheads amended their counterclaim and filed a third-party complaint against Sea Lands seeking to set aside the sales.

The district court granted the FmHA's motions to dismiss the counterclaim and for summary judgment. The court concluded that, while FmHA may have been time barred by federal law, 28 U.S.C. § 2415(a) (1988), from bringing an action on the notes, the FmHA was not barred by limitations from bringing a foreclosure action.

On May 6, 1993 the district court entered its Judgment based upon the previous Memorandum Opinion and Order (See Appendix at 10a-22a). On June 21, 1993 the Muirheads filed a timely Notice of Appeal of the Judgment in the district court with the United States Court of Appeals for the Fifth Circuit.

On January 25, 1995 the United States Court of Appeals entered its judgment and opinion finding that § 15-1-21 of the Mississippi Code was a statute of limitations, and that *United States v. Summerlin*, 310 U.S. 414 (1939) required it to hold that the FmHA was not subject to the Mississippi statute which extinguished mort-

gages in the absence of an underlying debt. However, the Fifth Circuit criticized this result concluding:

> In short, *Summerlin* and related cases ought to be reconsidered insofar as they hold that state statutes of limitations may not be applied to the government's real property foreclosure actions arising from federal loan programs. (Appendix at 9a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW RAISES SERIOUS AND PERVASIVE PROBLEMS FOR REAL ESTATE TITLES AND COMMERCE IN REAL ESTATE THROUGHOUT THE COUNTRY FROM THE PERPETUAL EXISTENCE OF FEDERAL MORTGAGES.

In the case below the Fifth Circuit held that deeds of trust taken by quasi-commercial federal lenders, such as the FmHA, are not extinguished by the expiration of the statute of limitations on their underlying debts and therefore survive forever. This was the position for which the FmHA argued. Other courts have reached the same result [3]; some have completely disagreed.[4]

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[3] See *United States v. Alvarado*, 5 F.3d 1425 (11th Cir. 1993); *Westnau Land Corp. v. U.S. Small Business Administration*, 1 F.3d 112 (2d Cir. 1993); *United States v. Dos Cabezas Corp.*, 995 F.2d 1486 (9th Cir. 1993); *United States v. Ward*, 985 F.2d 500 (10th Cir. 1993).

It is important to note that in *Alvarado* as in the New York Supreme Court case of *Cracco v. Cox*, 414 N.Y.S.2d 404 (App.Div. 1979), upon which virtually all of the other Circuit Court decisions are based, the Court turned to state law to determine whether a mortgage survived the bar of the underlying debt.

[4] *United States v. Thornburg*, 835 F.Supp. 543 (E.D. Cal. 1993); *Curry v. United States Small Business Administration*, 679 F.Supp. 966 (N.D. Cal. 1987). See also in a related context: *Davidson v. Federal Deposit Insurance Corp.*, 44 F.3d 246 (5th Cir. 1995).

The Fifth Circuit found itself to be bound by this Court's 56 year old decision in *United States v. Summerlin*, 310 U.S. 414 (1939) and decisions in the other Circuits. However, in a substantial departure from the other Circuit Court decisions, the Fifth Circuit harshly criticized the result it felt bound to reach and called for a reexamination of the aged *Summerlin* in the context of federal mortgage extinguishment.

> But although present authority compels acceptance of FmHA's position, we are troubled by the federal government's insistence that it may enforce ancient mortgages outstanding in numerous, long-lived and often default-prone federal lending programs essentially forever. The continued existence of these mortgages may cloud titles to property all over the country, and in so doing will engender confusion, higher real property transaction costs, and commercial instability. If federal agencies simply conformed their lending practices to the dictates of state law, as every private lender must, they would act more promptly upon defaulted mortgages and would not prejudice the alienability of reality [sic].
>
> The government's central proposition—that limitations may not run against the sovereign—seems quite inappropriate in the context of federal loan programs. . . . The Supreme Court understood [in *Kimbell Foods*] that superimposing on state commercial law special federal rules to govern lien priorities arising from federal loan programs would become hopelessly complex and would ultimately have adverse economic effects. (Appendix at 7a-8a)

As noted by the Fifth Circuit in its opinion, many decisions of this Court more recent than the 1939 *Summerlin* decision have refused to upset intricate state law schemes in response to the government's repeated requests for federal common law favoring it. E.g. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) and *U.S. v. Yazell*, 382 U.S. 341 (1966). The Circuits have

followed this Court's lead in refusing to upset established state commercial practices in favor of federal protectionism.[5]

The broad reach of *Summerlin* has been significantly modified since 1939. This Court on a number of occasions since *Summerlin* has pointed out the significant distinctions between the federal government acting in its essential sovereign capacity and in its quasi-commercial lender capacity.

For example, in *Yazell*, this Court reminded the federal government that, "The United States, as sovereign has certain preferences and priorities, but neither Congress nor this Court has ever asserted that they are absolute." 382 U.S. at 348-9. The *Yazell* Court held that the rights obtained by government lenders, in programs like the FmHA and the SBA, would be determined by non-discriminatory state law.[6] The Court specifically refused SBA's pleas for federal protectionism.

The *Yazell* Court also stated that typically "federal law" would be applied to supersede state law only where, by the nature of the programs or actions of the federal government, there was a requirement of uniformity throughout the country. Otherwise, the Court pointed

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[5] E.g. *Davidson v. Federal Deposit Insurance Corp., supra; United States v. Currituck Grain, Inc.*, 6 F.3d 200 (4th Cir. 1993); *Regan v. U.S. Small Business Administration*, 926 F.2d 1078 (11th Cir. 1991); *Wabash Valley Power Association, Inc. v. Rural Electrification Administration*, 903 F.2d 445 (7th Cir. 1990); *United States v. Kelley*, 890 F.2d 220 (10th Cir. 1989); *Dupnik v. U.S.*, 848 F.2d 1476 (9th Cir. 1988); *U.S. v. Irby*, 618 F.2d 352 (5th Cir. 1980); *United States v. Dismuke*, 616 F.2d 755 (5th Cir. 1980); *United States v. S.K.A. Associates, Inc.*, 600 F.2d 513 (5th Cir. 1979).

[6] In *Yazell* the SBA failed to satisfy the Texas laws on coverture in taking a deed of trust from Mrs. Yazell and her husband. The Court found that the SBA knew what Texas law was with regard to Mrs. Yazell's capacity when they negotiated the contractual agreements, and thus they were bound by it.

out that it would be solicitous of state interests, particularly in the field of family and family property arrangements, and that these should not be overridden unless "clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if state law is applied." 382 U.S. at 352.

Yazell's holding requiring a "clear and substantial" governmental interest to override non-discriminatory state law was further amplified in *Kimbell Foods*. There the Court held that programs such as the FmHA and SBA were not nationwide Federal programs requiring uniform national rules, and that the government, when acting as a quasi-commercial lender, does not require the special priority which it compels as sovereign in its tax-collecting capacity. *Id.* at 737-8.

The government had argued, as the FmHA essentially did below, that the Court should carve out special federal law to protect the U.S. Treasury and ease loan administration. *Kimbell* flatly rejected the government's argument, stating:

> We are unpersuaded that, in the circumstances presented here, nationwide standards favoring claims of the United States are necessary to ease program administration or to safeguard the Federal Treasury from defaulting debtors. Because the state commercial codes "furnish convenient solutions in no way inconsistent with adequate protection of the federal interest[s] (Citation omitted), we decline to override intricate state laws of general applicability on which private creditors base their daily commercial transactions.
>
> Incorporating state law to determine the rights of the United States as against private creditors would in no way hinder administration of the SBA and FHA loan programs. *Id.* at 729.

In fact, in *Kimbell Foods* the Court specifically rejected the idea that the FmHA loan program, (which is the same as the one involved in the instant case), needed special uniform national rules. The Court found that the FmHA tailored its programs, forms and regulations to state law, and that "they mandate compliance with state procedures for perfecting and maintaining valid security interests, and highlights those rules which differ from state to state." *Id.* at 731. The Court went on to find that the FmHA's protestations of imminent disruption were not supported.

> Contrary to the Government's claim that the FHA complies only with state procedural rules, . . . the agency's reliance on state law extends to substantive requirements as well. Indeed, applicable regulations suggest that state rules determine the priority of FHA liens when federal statutes or agency regulations are not controlling. (Citations omitted).
>
> Thus, the agencies' own operating practices belie their assertion that a federal rule of priority is needed to avoid the administrative burdens created by disparate state commercial rules. The programs already conform to each State's commercial standards. By using local lending offices and employees who are familiar with the law of their respective localities, the agencies function effectively without uniform procedures and legal rules. *Id.* at 731-2.

The *Kimbell Foods* Court summed up its position on government programs such as the FmHA's as opposed to programs which are truly "nationwide" in scope and distinguished between the essential sovereignty of the United States in collecting taxes and the rather different position of the government as lender.

> The Government therefore is in substantially the same position as private lenders, and the special status it seeks is unnecessary to safeguard the public fisc. Moreover, Congress' admonitions to extend loans judiciously supports the view that it did not in-

> tend to confer special privileges on agencies that enter the commercial field. Accordingly, we agree with the Court of Appeals . . . that '[a]s a quasi-commercial lender, [the Government] does not require the special priority which it compels as sovereign" in its tax-collecting capacity.' (Citation omitted). *Id.* at 737-8.

Subsequent to the decision in *Kimbell*, the Fifth Circuit decided *United States v. S.K.A. Associates, Inc., supra.* In discussing a question of lien priority between the Small Business Administration and a claimant of a landlord's lien, the Fifth Circuit stated as follows:

> Yet it seems to us that Justice Marshall in his very detailed opinion for a unanimous court in *Kimbell* sought to carefully instruct Government agencies that in their commercial lending activities they are subject to "customary commercial practices," (citation omitted), and should fair no better, and no worse, than a private lender. 600 F.2d at 516.

More recently, in a somewhat different context, this Court has again pointed out the distinctions between the Federal government's essential sovereign capacity and its other capacities: "But the FDIC is not the United States, ..." *O'Melveny & Myers v. FDIC*, —— U.S. ——, ——, 114 S.Ct. 2048, 2053 (1994). *O'Melveny* also reiterated the rule set forth in *Yazell* and further developed in *Kimbell Foods*: that a special federal rule will be created to displace state law only "where there is a 'significant conflict between federal policy or interest and the use of state law.' " (Citation omitted) *Id.* at 2055.

In the instant case the Court of Appeals specifically found that there was no basis for a conflict between federal and state interests as they applied to mortgage extinguishment and called for this Court to reexamine *Summerlin* in light of more recent precedent.

> Apart from the *Summerlin* principle, there is, as clearly evident in *Kimbell* and *Yazell*, no ground for

> conflict between state and federal rules of decision regarding the enforceability of government-backed mortgages.
>
> Contrary to the commercial realism prominent in all of these cases, the ancient attribute of sovereignty asserted by the federal government is far more appropriate to essential sovereign functions than to the federal government's role as lender to veterans, small business owners, farmers, and disaster victims among others. That the attribute is ancient does not make it sensibly applicable to the government's role in commercial transactions. In fact, doing away with limitations periods on a significant number of mortgage foreclosures takes a giant step backwards from the standpoint of public policy concerns for fairness and economic efficiency. Nearly every state has enacted laws to prevent the disruption of commerce in real property caused by the existence of ancient mortgages. *In short, Summerlin and related cases ought to be reconsidered insofar as they hold that state statutes of limitations may not be applied to the government's real property foreclosure actions arising from federal loan programs.* Alternatively, Congress should amend 28 U.S.C. § 2415 expressly to so provide. (Emphasis supplied). (Appendix at 8a-9a).

There is no Federal statute deciding whether or not a deed of trust and its lien on real property survives the expiration of the underlying indebtedness. In this eventuality, Federal courts will normally apply the nondiscriminatory law of the state in question as the Federal rule of decision.[7] A uniform federal rule will only be adopted in contravention of state law where the nature of the Federal program is such as to require a rule uniform in character throughout the nation. This generally occurs only where the specific objectives of the nationwide Federal program would be frustrated if a uniform

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[7] This is precisely what the Courts in *Curry* and *Thornburg* did.

national rule was not adopted. Such is demonstrably not the case here.

This same strong policy of respect for state law in fields traditionally occupied by the states, where there is no demonstrated need for national uniformity, is at the heart of federalism and is the core of the foregoing line of decisions which lead away from *Summerlin*.

Since the Fifth Circuit found there to be no reason for conflict between state and federal law concerning the enforceability of deeds of trust, such as the FmHA ones involved in this case, there is no reason why Mississippi's non-discriminatory law providing for the extinguishment of deeds of trust when there is no longer a valid underlying debt should not be adopted as the Federal rule of decision in this case.

Despite the fact that there is no reason for a conflict between federal and state policies, such a conflict actually exists, and will continue to exist, until this Court addresses the issue directly.

Justice McLean, speaking for this Court 164 years ago in *Lewis v. Marshall*, 30 U.S. 470, 477-8 (1831), put his finger squarely on the problem posed by the continued utilization of *Summerlin* in the current context.

> The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate. Labor is paralyzed where the enjoyment of its fruits is uncertain; and litigation without limit produces ruinous consequences to individuals.

The extensive harm done and to be done by the holding below and the substantial criticisms cited by the Court of Appeals justify the grant of certiorari to review the judgment below.

II. THE DECISION BELOW RAISES IMPORTANT QUESTIONS CONCERNING THE APPLICATION OF STATE SUBSTANTIVE PROPERTY RIGHTS TO THE FEDERAL GOVERNMENT AND THE PROPER REACH OF FEDERAL SOVEREIGN IMMUNITY.

In its opinion below the Court of Appeals found § 15-1-21, the Mississippi statute on the extinguishment of mortgages in the absence of a valid underlying debt, to be a statute of limitations. Petitioners disagree here as they did below.

To be sure, as the Circuit found, § 15-1-21 is contained in the "Limitations of Actions" chapter of the Mississippi Code. However, the statute should be appraised according to its substance and not by the location given it by the Code compilers. The statute is the legislative enactment of the "lien theory of mortgages" [8] and establishes a substantive real property right, not a statute of limitations.

In Mississippi the law dealing with the enforceability of mortgages and deeds of trust has been clear and consistent for many years. "Where a debt is barred, the mortgage cannot be enforced." *Musser v. First National Bank of Corinth*, 147 So. 783, 784 (Miss. 1933). (See also *Gates v. Chandler*, 165 So. 442 (Miss. 1936) and *Temples v. First National Bank of Laurel*, 123 So.2d 852 (Miss. 1960)). The lien is incident to the debt and does not stand separately.

As found by Mr. Justice Holmes over 85 years ago in *Dupree v. Mansur*, 214 U.S. 161, 167 (1909) in examining a Texas statute like the Mississippi one here:

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[8] The Mississippi statute dates back to 1857. Its enactment was necessary to effectuate the "lien theory" of mortgages because the original English common law rule which we inherited was that a mortgage passed title to the property subject to redemption by payment. (See Appendix at 5a) for the Court of Appeals discussion of the lien vs. title theory of mortgages in general).

> By the law of Texas the security is incident to the note and does not warrant a foreclosure when the note does not warrant a judgment. This is not a matter of procedure or jurisdiction, but of substantive rights concerning land.

Thus, Petitioners urge that § 15-1-21 establishes a substantive right concerning property and not a statute of limitations despite its placement in the Mississippi Code. As such, it governed a portion of the rights the FmHA received when it contracted in Mississippi for a deed of trust.[9] Thus, § 15-1-21 effectively establishes a substantive precondition to the lien of the mortgage. Petitioners assert that the question is not whether state statutes of limitations are applied against the federal government, but rather what rights federal lenders knowingly contracted for and received in the first place.

Recently, another panel of the Fifth Circuit, in *Davidson, supra,* recognized that the issue posed in the instant case is not one of limitations but of property rights. In a similar setting the FDIC became the receiver of a failed bank and succeeded to the bank's position under certain deeds of trust. As part of its argument, the FDIC contended (as did FmHA in the instant case) that 28 U.S.C. § 2415(a) did not apply to mortgage foreclosures and that no state statute of limitation could therefore bar its action on the deed of trust in question. The *Davidson* Court refused to acept the FDIC's characterization of the argument, stating:

> [W]e decline to view the legal issue narrowly as one of limitations. We believe the more precise issue to

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[9] It should be noted that FmHA sought to otherwise take advantake of Mississippi law concerning the acquisition of a lien on real estate in Mississippi. E.g. FmHA recorded its deeds of trust in the Mississippi county land records and conducted power of sale foreclosures on the properties in question. Power of sale foreclosures are only available as the result of Mississippi statutory law, and therefore would have otherwise been unavailable to the FmHA.

> be whether the mortgage survives the debt, and, *in a case such as this*, that question is normally decided by state, not federal law. (Citing *Curry, supra*) (*Davidson, supra* at 250.)

As noted earlier, *Yazell* points out that government lenders are on notice of the limitations of their rights when they enter into loan contracts in the several states, and, in determining the nature of property rights created by a conveyance to the government, Federal courts look to the law of the state wherein the property is situated. *Foster v. United States*, 607 F.2d 943 (Ct.Cl. 1979). "Moreover, when the United States contracts to acquire or in fact acquires real property within a particular state, the laws of that state control what rights arise in the United States therefrom." *Id.* at 948. See also: *U.S. v. Brosnan*, 363 U.S. 237 (1960) (Extent of property and rights to which a Federal tax lien attached would be instructed by state law).

The foregoing holdings are brought into the specific focus of this case in *Curry*:

> [T]he general rule [is] that the federal common law governing contracts in which a federal agency is a party should be that of the state in which the contract was executed, assuming the state law does not unduly impact on a valid federal interest or the policies of the federal agency entering into the contracts. (Citing *Kimbell Foods, supra*, and *United States v. Crain*, 589 F.2d 996 (9th Cir. 1979)). (*Id.* at 971).[10]

The *Curry* court went on to find that whether the lien of the SBA's deed of trust survived the barring of the underlying debt would be controlled by California law. The exact same legal situation is presented in this case.

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[10] It is interesting to note that both parties to the *Curry* case, i.e. including the SBA, agreed that the status of SBA's property interest in the Curry property, the deed of trust and the power of sale "should be governed" by state law.

Statutes such as § 15-1-21 establish what amount to preconditions for the existence of a lien. They are not statutes of limitations. As the District Court stated in *Thornburg*, supra, "[A]pplying state rules regarding the extinguishment of liens does not directly implicate a state statute of limitations." *Id.* at 547. The excellent reasoning in both *Curry* and *Thornburg* support this proposition.

The decision of the Court of Appeals raises pervasive questions concerning what lien rights the quasi-commercial federal lenders obtain when they acquire contractual liens on real property. The question also remains as to whether Federal sovereign immunity concerns are even implicated by the utilization of non-discriminatory state law to determine whether federal mortgage liens are extinguished when the underlying debts are barred.

Petitioners assert that the foregoing constitute sufficient reason for granting certiorari to review the judgment of the Court of Appeals.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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April 24, 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-7414

FARMERS HOME ADMINISTRATION, ETC.,
Plaintiff-Appellee,

v.

JAMES I. MUIRHEAD, *et al.*,
Defendants.

JAMES I. MUIRHEAD, *et al.*,
Defendants-Third Party
Plaintiffs-Appellants,

v.

SEA LANDS, INC.,
Third Party
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

Jan. 24, 1995

Before POLITZ, Chief Judge, JONES, Circuit Judge, and FULLAM*, District Judge.

EDITH H. JONES, Circuit Judge:

The question in this case is whether the Farmers Home Administration, a federal agency, may be barred by state statute from enforcing its lien on Mississippi property, when the statutory bar arises from FmHA's untimeliness. Consistent with other federal courts of appeals, we hold that it may not be so barred. Unlike those other courts, however, we consider this a problematic result.

During 1979 and 1980, the Muirhead defendants executed promissory notes in favor of the Farmers Home Administration (FmHA) that were secured by deeds of trust on properties located in Mississippi. In April 1982, FmHA sent the Muirheads notices of acceleration declaring all of the promissory notes immediately due and payable. A second notice of acceleration and demand for payment was sent to the Muirheads in May 1985.

FmHA prepared to initiate foreclosure proceedings on the deeds of trust in October 1991 and brought this action to reform one of the deeds. The Muirheads answered and counterclaimed that under Mississippi law, none of the liens was enforceable because the statute of limitations had run on each of the underlying notes. While this action was pending, the properties covered by the deeds of trust—except for the property at issue in the reformation action—were sold by FmHA at a foreclosure sale. As a result, the Muirheads amended their counterclaim to set aside the sales.

The district court granted the government's motions to dismiss the counterclaim and for summary judgment. The court concluded that, while FmHA may have been time-barred by federal law, 28 U.S.C. § 2415(a) (1988),

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* District Judge of the Eastern District of Pennsylvania, sitting by designation.

from bringing an action on the notes, the government was not barred by limitations from bringing a foreclosure action.[1] We have reviewed the judgment of the district court and AFFIRM.[2]

Under a nationwide federal loan program like that of FmHA, it is settled that federal law ultimately controls the government's rights and responsibilities. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). Where no specific federal statute or regulation governs the matter at hand, federal courts must "fill the interstices of federal legislation 'according to their own standards.'" *Id.* at 727, 99 S.Ct. at 1458 (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943)). Normally, however, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny & Myers v. FDIC*, —— U.S. ——, ——, 114 S.Ct. 2048, 2054, 129 L.Ed.2d 67 (1994).

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[1] Section 2415(a) provides in relevant part:

> [E]very action for money damages brought by the United States . . . which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues. . . .

28 U.S.C. § 2415(a) (1988). For purposes of the motion to dismiss and for summary judgment, the district court assumed that the six-year limitations period had in fact run.

[2] In reviewing a 12(b)(6) dismissal, the court accepts all well pleaded averments as true, viewing them in the light most favorable to the nonmovant. *See Cooper v. Sheriff, Lubbock County*, 929 F.2d 1078, 1082 (5th Cir.1991). The dismissal should not be upheld unless it appears beyond doubt that the Muirheads can prove no set of facts which would entitle them to relief. *See id.* Since the Muirheads conceded below that the government's motion for summary judgment on its complaint for reformation should be granted if the court granted FmHA's motion to dismiss, we appropriately focus our review on the 12(b)(6) dismissal of the amended counterclaim.

Applying these principals to determine whether FmHA's foreclosure action against the Muirheads' property was barred by state law is a matter of characterization. To the federal government, the Muirheads' state law argument artfully dodges the essential fact that they would impose a state time bar upon the FmHA's remedy of foreclosure. A time bar, in the view of FmHA and other court decisions,[3] is a statute of limitations. State statutes of limitations do not, however, run against the federal government. *United States v. Summerlin,* 310 U.S. 414, 416, 60 S.Ct. 1019, 1020, 84 L.Ed 1283 (1940).[4] This ancient prerequisite of federal sovereignty constitutes a specific rule of decision that renders nugatory the federal courts' duty to select a federal rule or adopt state law as the rule of decision. *See Kimbell Foods, Inc., supra.* In the terms of *O'Melveny, supra,* if

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[3] *United States v. Alvarado,* 5 F.3d 1425, 1430 (11th Cir.1993); *Westnau Land Corp. v. United States Small Business Admin.,* 1 F.3d 112, 115 (2d Cir.1993); *United States v. Dos Cabezas Corp.,* 995 F.2d 1486, 1490 (9th Cir.1993) (in dicta); *United States v. Ward,* 985 F.2d 500, 502 (10th Cir.1993); *but see United States v. Thornburg,* 835 F.Supp. 543 (E.D.Cal.1993).

[4] *See also Guaranty Trust Co. v. U.S.,* 304 U.S. 126, 132, 58 S.Ct. 785, 788, 82 L.Ed. 1224 (1938); *Board of Jackson Cty. Comm'rs. v. U.S.,* 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313 (1939); *United States v. John Hancock Mut. Life Ins. Co.,* 364 U.S. 301, 81 S.Ct. 1, 5 L.Ed.2d 1 (1960); *United States v. California,* —— U.S. ——, ——, 113 S.Ct. 1784, 1790-91, 123 L.Ed.2d 528 (1993).

In *U.S. v. California, supra,* the Court noted that in *Summerlin* and in *Board of Comm'rs,* the right at issue [that was not barred by a state limitation statute] was obtained or created by a federal statute, and in *John Hancock,* there was a federal limitations period, and in each of those cases, "the Government was proceeding in its sovereign capacity." —— U.S. at ——, 113 S.Ct. at 1791. The Court then states that, "whether in general a state-law action brought by the United States is subject to a federal or state statute of limitations is a difficult question." *Id.* Because SBA's "state-law action" to foreclose arose from a federal loan program and SBA was proceeding "as the sovereign", the "difficult question" noted by the Court is not present here.

this is a statute of limitations case, there is no matter left unaddressed by federal law that must be supplemented by a state rule of decision.

The Muirheads naturally resist the reduction of their position to a statute of limitations question. To them, the FmHA's ability to foreclose after the remedy on their underlying debt has been time-barred presents an issue of substantive state property rights, which flows from Mississippi's subscription to the lien theory of mortgages. In Mississippi, as in several other states, "where a debt is barred, the mortgage cannot be enforced." *Musser v. First National Bank of Corinth,* 165 Miss. 873, 147 So. 783, 784 (1933). The lien is incident to the debt and does not stand separately. *See* GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES 608-12 (2d ed. 1970) (discussing intricacies of "lien theory" and "title theory"). Many other states, by contrast, have adhered to the title theory of mortgages, which has evolved over the years to hold that a lien does survive notwithstanding the expiration of the period for recovery on the debt. Property law varies considerably from state to state on this issue. Federal law ought to and does ordinarily rely on state law to define the incidents of real property ownership for purposes of implementing federal loan programs. *Foster v. United States,* 221 Ct.Cl. 412, 607 F.2d 943, 948 (1979) ("[I]n determining the nature of the property rights created by a conveyance . . . courts have applied the law of the situs of the real property involved"). The Muirheads conclude that, as *O'Melveny* put it, the circumstances under which FmHA's foreclosure may be barred by the expiration of the underlying debt do not constitute one of the "unusual" cases in which judicial creation of a specific "federal common law" rule "would be justified." —— U.S. at ——, 114 S.Ct. at 2055.

For several reasons, we concur in the government's characterization of the case. First, while the lien extinc-

tion argument advanced by the appellants has surface appeal, the statute on which they must rely more clearly supports the government's position. Found in chapter 15 of the Mississippi Code, entitled "Limitations of Actions," § 15-1-21 provides in relevant part:

> When a mortgage or deed of trust shall be given on real or personal estate, or when a lien shall be given by law, to secure the payment of a sum of money specified in any writing, an action or suit or other proceedings shall not be brought or had upon such lien, mortgage, or deed of trust to recover the sum of money so secured except within the time that may be allowed for the commencement of an action at law upon the writing in which the sum of money secured by such lien, mortgage, or deed of trust may be specified.

This statute reads like a statute of limitations: it forecloses an action or proceedings to enforce a lien not brought within the time for commencing a suit on the debt involved.

Second, to the extent the Muirheads concede that federal law, 28 U.S.C. § 2415(a), prescribes the limitation period for suit on FmHA's debt, even as to the application of § 15-1-21 they inferentially concede that some general federal law bears upon the limitation period governing the agency's action to foreclose its mortgage. Absent a specific federal limitation,[5] the thus-far unwavering federal rule exempting the federal government from statutes of limitations other than those enacted by Congress readily steps into this breach.

Third, every federal appellate court that has addressed whether there is a time bar on federal agencies' pursuit of real property foreclosure actions has agreed with the FmHA's position and has concluded that no such bar

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[5] 28 U.S.C. § 2415(c) does not apply to actions to foreclose mortgages.

exists. *Supra* n. 3. This includes one decision, not analyzed by appellants, originating from Oklahoma, a lien theory state. *United States v. Ward,* 985 F.2d 500 (10th Cir.1993).

Consequently, as the Muirheads must rely on an unabashed state statute of limitations, while venerable federal caselaw and the uniform rule among the circuit courts of appeals hold that no state limitations period, and specifically none governing foreclosures, is effective against the federal government, their appeal cannot succeed.

But although present authority compels acceptance of FmHA's position, we are troubled by the federal government's insistence that it may enforce ancient mortgages outstanding in numerous, long-lived and often default-prone federal lending programs essentially forever. The continued existence of these mortgages may cloud titles to property all over the country, and in so doing will engender confusion, higher real property transaction costs, and commercial instability. If federal agencies simply conformed their lending practices to the dictates of state law, as every private lender must, they would act more promptly upon defaulted mortgages and would not prejudice the alienability of reality.

The government's central proposition—that limitations may not run against the sovereign—seems quite inappropriate in the context of federal loan programs. In *Kimbell Foods, supra,* the Supreme Court devised a three-part test for determining when a federal rule of decision should supplant state law in cases involving federal loans. Courts must consider whether uniform national administration of the federal program is necessary, whether use of a state law rule will frustrate the federal objective, and whether a federal common law rule might disrupt commercial expectations founded upon state law. In *Kimbell Foods,* the pleas by FmHA and SBA for "uniformity," "protecting the federal fisc," and "ease of administra-

tion" were unanimously rejected in favor of maintaining stability and predictability in local commercial law. The Supreme Court understood that superimposing on state commercial law special federal rules to govern lien priorities arising from federal loan programs would become hopelessly complex and would ultimately have adverse economic effects.

Similarly, in *United States v. Yazell,* 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), the Court recognized an important federal policy to preserve the integrity of state family law and property relationships, which it held must prevail over SBA's desire for agency-favoring federal common law rules of decision. *Yazell* commented, in regard to the SBA loan program, that there was no specific need for uniformity, no problem in complying with state law, and in fact, SBA's compliance manual already carefully conformed its loans to the requirements of state law. 382 U.S. at 357, 86 S.Ct. at 509.[6] Most recently, in *O'Melveny,* the Court seems to suggest that only when there is outright conflict between federal law and state law regarding a federal regulatory scheme must state law be displaced. —— U.S. at ——, 114 S.Ct. at 2055. Apart from the *Summerlin* principle, there is, as clearly evident in *Kimbell* and *Yazell,* no ground for conflict between state and federal rules of decision regarding the enforceability of government-backed mortgages.

Contrary to the commercial realism prominent in all of these cases, the ancient attribute of sovereignty asserted by the federal government is far more appropriate to essential sovereign functions than to the federal government's role as a lender to veterans, small business owners, farmers, and disaster victims among others. That the attribute is ancient does not make it sensibly applicable

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[6] Surely the national interest in maintaining the consistency of state real property law is as great as the policy at stake in *Yazell,* and the inconvenience to SBA or FmHA of fully and timely complying with state law is just as small.

to the government's role in commercial transactions. In fact, doing away with limitations periods on a significant number of mortgage foreclosures takes a giant step backwards from the standpoint of public policy concerns for fairness and economic efficiency. Nearly every state has enacted laws to prevent the disruption of commerce in real property caused by the existence of ancient mortgages.[7] In short, *Summerlin* and related cases ought to be reconsidered insofar as they hold that state statutes of limitations may not be applied to the government's real property foreclosure actions arising from federal loan programs. Alternatively, Congress should amend 28 U.S.C. § 2415 expressly to so provide.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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[7] *See* GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES 621-23 (2d ed. 1970) (describing emerging trend of states to create "ancient mortgage" statutes allowing one to merely check the record and refer to a calendar to determine whether a very old mortgage continues to cloud title).

APPENDIX B

[Filed Apr. 26, 1993]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. J91-0585(L)(C)

UNITED STATES OF AMERICA, ACTING ON BEHALF OF FARMERS HOME ADMINISTRATION,
Plaintiff

VS.

JAMES I. MUIRHEAD AND HIS WIFE, LUCILLE MUIRHEAD, *et al.*,
Defendants

MEMORANDUM OPINION AND ORDER

The United States of America, acting on behalf of the Farmers Home Administration (FmHA), brought this action for reformation of a certain deed of trust executed by James I. Muirhead, Lucille Muirhead, Robert E. Muirhead and Glenda Muirhead, d/b/a Timberlane Ranch, in favor of FmHA on certain real property located in Simpson County, Mississippi. The Muirheads counterclaimed against FmHA contending that the deed of trust upon which this action was brought, as well as a number of other deeds of trust executed by the Muirheads in favor of FmHA, are void and unenforceable since the statute of limitations has run on the underlying debts. The Muirheads asked that the court order FmHA to cancel the deeds of trust on the land records and further requested an order setting aside FmHA's foreclosure sales of properties covered by the deeds of trust.

This cause is presently before the court on the motion of FmHA for summary judgment and to dismiss amended counterclaim. A response to the motion has been filed by the Muirheads, and defendant Deposit Guaranty National Bank (Depost Guaranty) has separately responded to the motion. Having considered the motion and responses filed by these defendants, the court concludes that FmHA's motion is well taken and should be granted.

FACTS AND PROCEEDINGS

During 1979 and 1980, various of the Muirhead defendants executed promissory notes in favor of FmHA, which notes were secured by several deeds of trust on properties located in Copiah, Rankin, Hinds and Simpson counties in Mississippi.[1] On April 2, 1982 and April 13, 1982, FmHA sent the Muirheads notices of acceleration and demand for payment on all of the promissory notes, declaring the notes "immediately due and payable." On April 16, 1982, a few days after the notices were sent, the Muirhead defendants filed a Chapter 11 bankruptcy proceeding which was converted to a Chapter 7 proceeding the following year. Though FmHA obtained

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[1] The Muirheads executed promissory notes in favor of FmHA, as follows:

September 27, 1979	$1,150,000
September 27, 1979	143,000
September 27, 1979	57,000
April 10, 1980	110,000
April 21, 1980	116,350

The notes were secured by deeds of trust on various parcels of real property, as follows:

September 27, 1979	Rankin
September 27, 1979	Simpson
September 27, 1979	Hinds
September 27, 1979	Copiah
April 21, 1981	Rankin
April 21, 1981	Simpson
April 21, 1981	Hinds
April 21, 1981	Copiah

an order from the bankruptcy court on July 19, 1993 lifting the automatic stay of 11 U.S.C. § 362 as to FmHA, FmHA took no action with respect to the Muirheads' indebtedness until May 20, 1985, when FmHA sent a second notice of acceleration and demand for payment. Thereafter, FmHA did nothing more until October 1991, when it began preparing to initiate foreclosure proceedings with respect to the real property covered by the deeds of trust.

In furtherance of its efforts to foreclose on the deeds of trust executed by the Muirheads, FmHA filed the present action on October 9, 1991 seeking reformation of one of the deeds of trust, covering property located in Simpson County, contending that the legal description of two of the parcels of property, as set forth in the instrument, contained scrivener's errors which prevented FmHA from foreclosing as to those parcels. FmHA named as defendants the Muirheads, as well as various entities holding liens against the property, including Deposit Guaranty. In their answer to the complaint, the Muirheads denied that FmHA was entitled to reformation of the Simpson County property deed of trust and claimed, additionally, that none of the deeds of trust were enforceable since the underlying indebtednesses were barred as a result of the running of the statute of limitations. Additionally, by way of a counterclaim, they sought an adjudication that the deeds of trust were barred and unenforceable, together with a judgment requiring the FmHA to cancel the deeds of trust on the land records.

A foreclosure sale was conducted as to all but the Simpson County deed of trust on November 26, 1991.[2] FmHA purchased the property covered by all but one of the

[2] After this action was filed, the Muirheads sought and were granted a temporary restraining order enjoining FmHA from proceeding with foreclosure of any of the deeds of trust. As they were unable to raise the required bond, the foreclosure proceeded as scheduled.

deeds of trust, and the Rankin County property covered by that deed of trust was purchased by Sea Lands, Ltd. After the properties were sold, save the two parcels that were the subject of FmHA's complaint, the Muirheads amended their counterclaim and filed a third-party complaint against Sea Lands demanding that the sales be set aside based on their contention that the sales were wrongful and void since the underlying deeds of trust were no longer valid and enforceable.

FMHA'S MOTION TO DISMISS MUIRHEADS' COUNTERCLAIM

It is undisputed that the statute of limitations applicable to the promissory notes executed by the Muirheads is 28 U.S.C. § 2415(a), which establishes a six-year limitation for "every action for money damages brought by the United States or any officer or agency thereof which is founded on any contract." According to the Muirheads, this six-year limitations period on the notes expired on or about July 5, 1989.[3] The issue presented by the Muir-

[3] The Muirheads' computation is derived as follows: The notes to FmHA became fully due and payable and thus the applicable statute of limitations began to run on April 2 and April 13, 1982, when the government first gave notice of acceleration and demanded immediate payment. *See Nyhus v. Travel Mgmt. Corp.*, 466 F.2d 440 (D.C. Cir. 1972). Therefore, they contend that after excepting from the limitations period the time during which the bankruptcy stay was in place (April 16, 1982 through July 19, 1983), *see In re Hunters Run, Ltd. Partnership*, 875 F.2d 1425 (9th Cir. 1989) (automatic stay tolls statute of limitations), the six-year time limitation lapsed on or about July 5, 1989.

FmHA disputes the Muirheads' calculation and contends, instead, that while the six-year limitations period did begin to run on April 2 and April 13, 1982, the tolling of the limitations period as a result of the bankruptcy stay continued beyond July 19, 1983, the date the stay was lifted, until May 20, 1985, because FmHA took no action until that time to reaccelerate the Muirheads' indebtedness. Further, according to FmHA, the limitations period was tolled from May 7, 1987 until December 28, 1988, as a result of an injunction against FmHA foreclosures and accelerations issued

heads' counterclaim, and by FmHA's motion to dismiss the counterclaim, is whether FmHA is barred from exercising its foreclosure rights under the deeds of trust since it is time-barred from maintaining an action on the notes evidencing the underlying debts.

As indicated, defendants maintain that FmHA is barred by the running of the applicable statute of limitations from filing an action against them on the promissory notes for which the deeds of trust stand as security and that, because FmHA is barred from maintaining any action against them on the underlying indebtednesses, so, too, is it barred from foreclosing against the deeds of trust. They contend that since there is no federal statutory rule governing whether a deed of trust survives the extinguishment of the underlying debt by the passing of the period of limitations, this court must fashion federal common law to resolve the issue and that in so doing, the court should adopt Mississippi law as the federal rule of decision. And, since under Mississippi law, the right and remedy on a deed of trust do not survive the running of the statute of limitations on the underlying indebtedness,[4] they reason that the deeds of trust at issue here

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by the district court in *Coleman v. Block*, 663 F. Supp. 1315 (D.N.D. 1987). Under this computation, the limitations period had not expired at the time this suit was filed.

In the court's view, it is likely that neither party is correct in its analysis of this issue. However, because the court concludes that irrespective of the running of the limitations period on the underlying notes, FmHA is not barred from exercising its foreclosure rights, the court need not determine when, or if, the limitations period on the notes expired. The court simply assumes for purposes of deciding FmHA's motion that it expired prior to the date suit was filed.

[4] *See Musser v. First Nat'l Bank of Corinth*, 147 So. 783, 784 (Miss. 1933) ("Where a debt is barred, the mortgage cannot be enforced."); Miss. Code Ann. § 15-1-21 (1972) ("in all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred.").

became void and unenforceable when the statute of limitations expired on the promissory notes.

The court cannot accept the Muirheads' position. It is universally accepted that "the United States is not subject to any statute of limitations unless Congress has expressly provided otherwise," *United States v. Matthews*, No. 86-CV-3645, 1988 WL 76567, at *1 (E.D.N.Y. 1988) (citing *United States v. Podell*, 572 F.2d 31, 35 n.7 (2d. Cir. 1978), and *United States v. Summerlin*, 310 U.S. 414, 416-17 (1940)), and that, with respect to actions by the government to foreclose mortgages or deeds of trust, Congress has not provided any limitations period, under § 2415(a) or elsewhere, *id.* *See also United States v. Ward*, No. 92-7068 (10th Cir. Feb. 8, 1993) (no time limitation exists on government's enforcement of mortgage; "2415(a) may cut off a civil action on a note, but the government may still foreclose on the mortgage securing the debt."); *United States v. Succession of Siddon*, 812 F. Supp. 674, 676 (W.D. La. 1993) ("The administrator argues that the action to recover on the underlying notes has prescribed under § 2415(a) and thus the action to foreclose on the mortgages, because of its accessorial nature, must fall as well. La.Civ.Code. Ann. art. 3411(3). . . . We . . . hold that the plaintiff's right to foreclose on the mortgage is not prescribed under § 2415(a)."); *Westnau Land Corp. v. United States Small Bus. Admin.*, 785 F. Supp. 41, 43 (E.D.N.Y. 1992) (right to foreclose on mortgage is distinct from right to bring action for money damages on the note representing the debt and no federal statute of limitations applies to actions to foreclose a mortgage); *United States v. Freidus*, 769 F. Supp. 1266, 1273 (S.D.N.Y. 1991) (mortgage foreclosure actions brought by federal government are not governed by § 2415(a)); *United States Small Bus. Admin. v. Edwards*, 765 F. Supp. 1215, 1222 (M.D. Pa. 1991) (though Small Business Administration's claim for money damages on note was time-barred, "the SBA's action insofar as it seeks to foreclose on property secur-

ing debt [was] not time-barred"); *United States v. Copper*, 709 F. Supp. 905, 908 (N.D. Iowa 1988) (while § 2415 (a) "bars government from bringing a civil action to enforce defendants' debt[,] . . . the statute in no way limits the government's right to foreclose a mortgage given to secure said debt."); *Gerrard v. United States Office of Educ.*, 656 F. Supp. 570, 574 (N.D. Cal. 1987) ("Section 2415(a) . . . cuts off the remedy of a civil action on a debt brought by the government, but leaves open many other means of enforcing the government's right," including foreclosure of the mortgage securing the debt.); *Curry v. United States Small Bus. Admin.*, 679 F. Supp. 966, 970 (N.D. Cal. 1987) (statute of limitations of § 2415(a) will not bar foreclosure action); *Cracco v. Cox*, 414 N.Y.S.2d 404, 406, 66 A.D. 447 (1979) ("Nowhere is there an indication that subdivision (a) of section 2415 is to apply to any [type of action than actions for money damages based on contract] or that it was intended to effect a sweeping change in the general rule that limitation periods do not govern actions brought by the United States").

Further, though recognizing that state law may be utilized where federal law controls an issue but does not address that issue, the courts have concluded, almost without exception, that state law will not be resorted to in order to provide the rule of decision on this limitations issue:

> The general rule is that the rights of the United States under . . . federal . . . program[s] are governed by federal law. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979). Where federal statutes or laws do not delineate these rights, the federal courts must "fill the interstices of federal legislation 'according to their own standards.'" *Id.* at 727 (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). In this case, there is no vacuum to fill because the ancient rule that the

> United States is not subject to a limitations period clearly addresses the issue presented.

Matthews, 1988 76567 WL, at 1. In other words, given the longstanding federal rule that the United States is not subject to any limitations period unless Congress has expressly provided otherwise, it cannot be said that federal law is silent on this issue. And since federal law does address the issue, there is no cause to resort to state law for an answer. *See United States v. Ward*, No. 92-7068 ("[B]ecause the underlying loans were made . . . by the [FmHA] . . . and emanated from the Farm and Rural Development Act of 1949, a nationwide federal program, the government is not affected by Oklahoma's lien expiration law. . . . Thus, if the government is barred from the enforcement of the mortgage, the limitation must come from federal law. No such limitation exists."); *Westnau Land Corp.*, 785 F. Supp. at 43 (state's statute of limitations on mortgage foreclosure actions did not bar government from seeking to foreclose since federal law applied); *Copper*, 709 F. Supp. at 907 (finding Iowa rule inapplicable to Small Business Administration's foreclosure action against property mortgaged by defendants); *Gerrard*, 656 F. Supp. at 574-75 (rejecting contention that state statute of limitations barred action; "The United States . . . is not subject to state statutes of limitations.").

This court is in agreement with the conclusions reached by these courts and, accordingly, holds that though FmHA may have become barred by the six-year statute of limitations of § 2415(a) from maintaining an action against the Muirheads on the promissory notes evidencing their underlying debts, the FmHA's right to foreclose the deeds of trust was nevertheless preserved by federal law.[5] It

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[5] The court has been provided a copy of the district court's opinion in *Hines v. United States, Farmers Home Admin.*, No. 2:90-0683-15 (D.S.C. 1991), in which the court reached a contrary conclusion. However, inasmuch as the *Hines* opinion was subse-

follows that the Muirheads' counterclaim against FmHA, being predicated solely on their contention that the FmHA was barred from foreclosing by virtue of the limitations bar against proceeding on the underlying notes, cannot survive FmHA's motion to dismiss.

THIRD-PARTY COMPLAINT AGAINST SEA LANDS

By their third-party complaint against Sea Lands, the Muirheads seek to have set aside the foreclosure sale at which Sea Lands purchased certain of the Muirhead property. As the court has concluded that the counterclaim must be dismissed and as the third-party complaint is based on the same theory and arguments as the Muirheads' counterclaim against FmH, the third-party complaint is due to be dismissed as well.

DEPOSIT GUARANTY'S RESPONSE

Depost Guaranty, which was named as a defendant in this action because it holds a judgment lien against the property covered by FmHA's deeds of trust,[6] has responded in opposition to FmHA's motion to dismiss and for summary judgment.[7] In its response, Deposit Guar-

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quently rescinded and vacated by the court which issued it, the opinion is of little, if any, precedential value.

[6] Deposit Guaranty obtained a judgment against James Muirhead in the amount of $63,000 on March 2, 1987 and enrolled its judgment in Rankin, Simpson, Copiah and Hinds Counties.

[7] FmHA has moved to strike Deposit Guaranty's response on the basis that Deposit Guaranty lacks standing to either object to or consent to the relief sought by FmHA's motion. Earlier in this action, the magistrate judge denied a motion by Deposit Guaranty for leave to amend to assert a counterclaim against FmHA and that ruling by the magistrate is the subject of an appeal by Deposit Guaranty. The court cannot conclude that the magistrate judge's decision was clearly erroneous or contrary to law. However, the court is of the view that even though Deposit Guaranty was not permitted to file its counterclaims, it nevertheless has a sufficient

anty insists that the primary issue in this case insofar as Deposit Guaranty is concerned is not whether a statute of limitations has run, but rather concerns relative lien priorities. The issue, according to this defendant, is whether or not FmHA still has a lien on the Muirhead properties with respect to other existing or potential creditors who also have lien rights in the properties.

Deposit Guaranty acknowledges that if FmHA has a valid lien against the properties, then FmHA's lien is superior to that of Deposit Guaranty.[8] It argues, though, that if the statute of limitations has run so as to bar FmHA's right to foreclose or enforce its lien, then the liens created by FmHA's deeds of trust have ceased to exist and FmHA has no valid lien against the property and certainly no lien priority. From this position, DGNB reasons that because the issue is whether FmHA had a valid lien on the properties at the time of foreclosure—or as to the Simpson County properties whether it retains a valid lien—the court must look to state law to determine whether the statute of limitations has run, and that under Mississippi law, the expiration of the limitations period as to the promissory notes operates to bar FmHA from foreclosing on the deeds of trust.

In the court's opinion, Deposit Guaranty's characterization of the issue as one of lien priorities rather than of limitations is a misguided attempt to avoid the precise result which the court has reached with respect to the Muirheads. The argument places the cart before the horse. The threshold issue which the court is called upon to resolve in this case, both as to the Muirheads *and*

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interest in the matters raised by FmHA's motion to permit the court's consideration of Deposit Guaranty's position by virtue of its status as a defendant lienholder.

[8] It appears undisputed that FmHA had a first lien against each of the subject properties and the Internal Revenue Service had the second lien position. Deposit Guaranty occupied the position of third lienholder.

as to Deposit Guaranty, is whether FmHA became time-barred from foreclosing on the deeds of trust. The lien positions of other parties, including Deposit Guaranty, would become an issue only if FmHA was barred from foreclosing. The only basis for Deposit Guaranty's challenging FmHA's lien position is its contention that FmHA was precluded from foreclosing by the running of the limitations period. It follows, therefore, that because FmHA was not barred from foreclosing, as the court has concluded *supra,* FmHA's lien position remained superior to Deposit Guaranty's.

Even if the court were to treat the issue vis-a-vis Deposit Guaranty as one of lien priorities, as this defendant insists it must, the court would still conclude that FmHA's motion should be granted. Deposit Guaranty argues, as did the Muirheads, that Mississippi lien law—to the effect that the liens created by FmHA's deeds of trust have expired because the underlying debt is barred by the statute of limitations—should provide the rule of decision relative to the limitations issue since there is no federal law on the subject. And though Deposit Guaranty, like the Muirheads, contends that the cases noted above which have held otherwise were wrongly decided, this defendant also contends that even if the holdings of those cases are appropriately applied to the Muirheads, they should not be applied to a lienholder, such as Deposit Guaranty. In support of this position, Deposit Guaranty cites *United States v. Kimbell Foods, Inc.,* 440 U.S. 715 (1979), in which the Supreme Court adopted state law as the appropriate federal rule for establishing the relative lien priority of competing federal and private liens. FmHA, however, forcefully, and persuasively argues that *Kimbell Foods* does not extend to the situation here presented. According to FmHA, under *Kimbell Foods,* this court would only look to Mississippi law on the statute of limitations issue if the failure to apply Mississippi law would disrupt commercial relationships with

respect to the perfection and priority of liens. No disruption would occur here if the court declined to apply Mississippi law since Deposit Guaranty, and all other lienholders, acquired liens on the property before the date on which it is contended the statute of limitations expired.

The court in *Kimbell Foods* expressed concern that application of federal law, rather than state law, might in some instances prejudice "[c]reditors who justifiably rely on state law to obtain superior liens. . . ." 440 U.S. at 739. If the government were given precedence over other commercial lenders who would otherwise be in a superior lien position when the government's lien arose, that private commercial lender's expectations could be thwarted. *Id.* In this case, Deposit Guaranty's judgment lien, perfected on March 2, 1987, placed Deposit Guaranty in the position of a third lienholder on the Muirhead properties when its judgment was enrolled. It is undisputed that at that time, the statute of limitations had not run and did not expire until sometime after Deposit Guaranty perfected its lien. Because Deposit Guaranty had never been in a superior lien position to FmHA, the concerns expressed in *Kimbell Foods* would seem to have no application. Thus, Deposit Guaranty seeks to rely, after the fact, upon the alleged running of the statute of limitations to improve, not merely protect, its lien position. *Kimbell Foods* should not be read to countenance Deposit Guaranty's interest.

MOTION FOR SUMMARY JUDGMENT

The Muirheads have conceded that if the court grants FmHA's motion to dismiss, then FmHA's motion for summary judgment on its complaint for reformation should likewise be granted.

CONCLUSION

Based on the foregoing, it is ordered that FmHA's motion to dismiss the amended counterclaim is granted. It is further ordered that the Muirheads' third-party complaint against Sea Lands be dismissed. Finally, it is ordered that FmHA's motion for summary judgment is granted.

A separate judgment will be entered in accordance with Rule 58 of the Federal Rules of Civil Procedure.

ORDERED this 23d day of April, 1993.

/s/ Tom S. Lee
United States District Judge

(2)

Supreme Court, U.S.
FILED
JUN 30 1995

No. 94-1763

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES I. MUIRHEAD, ET AL., PETITIONERS

v.

FARMERS HOME ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Farmers Home Administration, a federal agency, may be barred from enforcing its lien on Mississippi property by a state statute of limitations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 42 F.3d 964. The opinion and order of the district court (Pet. App. 10a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1995. The petition for a writ of certiorari was filed on April 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979 and 1980, petitioners executed promissory notes in favor of respondent Farmers Home Administration (FmHA) that were secured by deeds of trust on properties located in Mississippi. Pet. App. 2a. In April, 1982, and again in May, 1985, FmHA sent petitioners notices of acceleration and demand for payment on the notes, declaring them to be immediately due and payable. *Ibid.*

In October, 1991, FmHA initiated foreclosure proceedings in the United States District Court for the Southern District of Mississippi. Pet. App. 2a, 12a. Petitioners answered and counterclaimed that under Mississippi law, the government's liens were unenforceable because the state statute of limitations had run on the underlying notes. *Id.* at 2a. The district court dismissed the counterclaim and granted FmHA summary judgment, concluding that the government was not barred from bringing a foreclosure action because state statutes of limitations do not bind the federal government. *Id.* at 10a, 17a.

2. The court of appeals affirmed. Pet. App. 1a-9a. The court underscored that this Court has long held that state statutes of limitations do not run against the federal government, citing, *inter alia*, *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940). Pet. App. 4a. The court found the state statute upon which petitioners relied to be a statute of limitations and therefore concluded it could not operate to extinguish the government's right to foreclose. *Id.* at 5a-6a.

ARGUMENT

1. Petitioners argue (Pet. 5-12) that Mississippi's statute of limitations should govern a suit brought by a federal agency involving debts incurred under a

federal loan program because this Court's decision in *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), dictates that transactions with the federal government should generally be governed by state law. *Kimbell Foods*, however, does not apply here.

In *Kimbell Foods*, this Court stated that it "has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs." 440 U.S. at 726. The Court observed, however, that where there is no federal law to be applied, the federal courts may "fill the interstices of federal legislation 'according to their own standards.'" *Id.* at 727. In such cases, although federal law continues to govern, the federal courts may either adopt state law as the uniform federal law or "fashion a nationwide federal rule." *Id.* at 728.

By its own terms, *Kimbell Foods* only controls where there is no federal standard to apply as the uniform federal rule. See *United States* v. *Kennedy*, 738 F.2d 584, 586 n.3 (3d Cir. 1984). In this case, there is no need to "fill the interstices of federal legislation" because there exist well-established federal rules governing limitations periods. As petitioners acknowledge (Pet. 6), this Court has consistently ruled that "[w]hen the United States becomes entitled to a claim, acting in its governmental capacity, and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement." *United States* v. *Summerlin*, 310 U.S. 414, 417 (1940); accord *United States* v. *California*, 113 S. Ct. 1784, 1790-1791 (1993); *United States* v. *John Hancock Mutual Life Ins. Co.*, 364 U.S. 301, 308 (1960); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126,

132-135 (1938). Congress's failure to provide a statute of limitations to govern actions brought by the United States is understood to manifest an intent to have no limitations period. See, *e.g.*, *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 367 (1977); *Costello* v. *United States*, 365 U.S. 265, 281-283 (1961); *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886); *United States* v. *Knight*, 39 U.S. (14 Pet.) 301, 315 (1840). "[T]here is no vacuum to fill because the ancient rule that the United States is not subject to a limitations period clearly addresses the issue presented." *Westnau Land Corp.* v. *United States SBA*, 1 F.3d 112, 117 (2d Cir. 1993).

The courts of appeals that have considered the precise question involved in this case have all agreed, based on *Summerlin* and *Kimbell Foods*, that there is no statute of limitations governing suits brought by the United States to foreclose on a mortgage. See *Magnolia Fed. Bank for Savings* v. *United States*, 42 F.3d 968, 970 (5th Cir. 1995); *United States* v. *Alvarado*, 5 F.3d 1425, 1430-1431 (11th Cir. 1993); *Westnau Land Corp.*, 1 F.3d at 115-116; *United States* v. *Dos Cabezas Corp.*, 995 F.2d 1486, 1489-1490 (9th Cir. 1993); *United States* v. *Ward*, 985 F.2d 500, 503 (10th Cir. 1993).[1]

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[1] Petitioners place considerable emphasis (Pet. 5 n.4, 11 n.7, 15-16) upon the district court decisions in *Curry* v. *United States SBA*, 679 F. Supp. 966 (N.D. Cal. 1987), and *United States* v. *Thornburg*, 835 F. Supp. 543 (E.D. Cal. 1993), in support of their argument that state law should apply here. A claimed conflict between district courts and courts of appeals does not ordinarily warrant this Court's attention.

In any event, the reasoning of the court in *Thornburg* is not persuasive because it did not consider or discuss this Court's decision in *Summerlin*. *Curry* is similarly unpersuasive because the government attorney in that case conceded at oral

2. Petitioners contend in the alternative (Pet. 12-16) that the statute at issue, Miss. Code Ann. § 15-1-21 (1972), establishes a substantive real property right, and is not a statute of limitations.[2] By its plain language, the statute does not establish a real property right, but instead bars a remedy in equity upon the passage of time. The court of appeals correctly found that the statute "reads like a statute of limitations: it forecloses an action or proceedings to enforce a lien not brought within the time for commencing a suit on the debt involved." Pet. App. 6a. The statute's placement in Chapter 1 of Title 15 of the Mississippi Code, entitled "Limitations of Actions," confirms this common-sense reading. *Ibid.*

This Court has rejected attempts to disguise time limitations as substantive rights. In *Summerlin*, the

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argument that "the status of SBA's property interest [at issue] should be governed by California law." 679 F. Supp. at 970-971. No such concession exists here. In this case, not only did the government contest the applicability of state law, but the deed of trust executed by petitioners expressly provided that the "[b]orrower agrees that the Government will not be bound by any present or future State laws * * * prescribing any * * * statute of limitations." Gov't C.A. Br. 34.

[2] Miss. Code Ann. § 15-1-21 (1972) provides:

> When a mortgage or deed of trust shall be given on real or personal estate, or when a lien shall be given by law, to secure the payment of a sum of money specified in any writing, an action or suit or other proceedings shall not be brought or had upon such lien, mortgage, or deed of trust to recover the sum of money so secured except within the time that may be allowed for the commencement of an action at law upon the writing in which the sum of money secured by such lien, mortgage, or deed of trust may be specified. In all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred.

Court rejected the argument that the state statute was not a statute of limitations but rather a "statute * * * for the orderly * * * settlement of decedents' estates," holding that the United States is not "subject to a state statute putting a *time limit* upon enforcement" of its claim. 310 U.S. at 417 (emphasis added). In this case, as in *Summerlin*, application of the state statute would not resolve the propriety of the government's substantive property right but whether the undisputed property right of the government may be cut off by the passage of time, a classic statute of limitations question. See *United States* v. *Ward*, 985 F.2d at 503 (Oklahoma's lien expiration law is a statute of limitations "because the clear import of the statute is to limit the time within which an Oklahoma mortgage can be enforced").[3]

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[3] Petitioners' reliance (Pet. 13-14) on *Dupree* v. *Mansur*, 214 U.S. 161 (1909), is unavailing. *Dupree* was a bankruptcy case in which the debtor invoked a state statute of limitations similar to the one at issue here. The Court rejected the argument that federal courts were free to ignore state statute of limitations in suits between private parties because, foreshadowing the dichotomy later announced in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), the limitations period was "substantive," rather than "procedur[al]." 214 U.S. at 167.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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